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NO. 86-1854

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

NEW BEDFORD FISHERMEN'S
WELFARE FUND, ET AL.,
Petitioners,

v.

BALTIC ENTERPRISES, INC., ET AL.,
Respondents

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

I. Whether the District Court has jurisdiction to hear suits brought by multiemployer employee benefit funds to recover contributions pursuant to Sections 502 and 515 of the Employee Retirement Incomes Security Act (ERISA) or whether the District Court must defer to the National Labor Relations Board's (NLRB) primary jurisdiction.

SUMMARY OF ARGUMENT

The defendants' Motion to Dismiss in the District Court was property granted. The failure to continue payments after the collective bargaining agreement expires may be an unfair labor practice. However, absent a specific grant of jurisdiction to the District

Courts, the NLRB has exclusive jurisdiction to determine what constitutes an unfair labor practice.

ERISA, sec. 515 29 U.S.C. sec. 1145 provides a specific grant of jurisdiction to collect delinquent contributions, but only while the collective bargaining agreement remains in force. Subsequent to the expiration of a collective bargaining agreement, ERISA is not an exception to the general rule that Federal Courts will defer to the Board's determination.

The Respondents Appellees submit that the First Circuit Court of Appeals was correct in affirming the granting of a Motion to Dismiss in the U.S. District Court for the District of Massachusetts and the Petition for Writ of Certiorari should be denied.

ARGUMENT

The Petitioners Appellants filed suit in the District Court seeking recovery for unpaid contributions to two multi-employer funds. The defendants filed a Motion to Dismiss for lack of subject matter jurisdiction on the grounds that this was a matter for consideration by the National Labor Relations Board. The Motion was granted by the District Court and affirmed by the First Circuit.

The failure to honor the terms of a collective bargaining agreement after expiration and before an impasse is reached is an unfair labor practice. Once an impasse is reached an employer may unilaterally implement the best offer made in negotiations N.L.R.B. v. Katz, 369 U.S. 736, 745 (1962). The determination as to whether an unfair

labor practice exists is with the N.L.R.B., 29 U.S.C. Sec. 158 (a)(1)(5). The Supreme Court has recognized that the initial determination of whether an activity is an unfair labor practice rests with the Board, and not the federal Courts. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), Kaiser Steel Corporation v. Mullins, 455 U.S. 72, 83 (1982). Thus unless there is a specific statutory grant of jurisdiction, such as Section 301 of Labor Management Relations Act, 29 U.S.C. sec. 185, to the Federal Courts, the Courts must and should defer to the Board.

The Petitioners-Appellees contend that ERISA Section 515 constitute such a specific exception. The Ninth Circuit in the case of Laborers Health and Welfare Trust Fund for Northern California, et. al., v. Advanced

Lightweight Concrete Co., Inc., 779 F2d 497 (9 Cir. 1985) Cert. granted, _____ U.S. _____, 107 S. Ct. 1283, 94 L. Ed.2d 142 (1987) discussed the language of this Section at length and concluded that the language of section 515 does not constitute a grant of jurisdiction post expiration of the collective bargaining agreement so as to constitute an exception to the general rule of deferral to the N.L.R.B. for determination of unfair labor practices.

The opinion in U.A. 198 Health and Welfare, Education Pension Funds v. Rester Refrigeration Service, Inc., 790 F2d 423 (5th Cir. 1986) considered the legislative history and concluded that portions of the legislative history would support either view of Sec. 515. To date every reported case except one that has considered the issue has

concluded that ERISA does not grant jurisdiction to the Courts post contract MO-KAN Teamsters Pension Fund v. Botsford Ready Mix Co., 605 F. Supp. 1441 (W.D. Mo. 1985) and Pattern Makers Pension Fund v. Badge Pattern Works, Inc., 615 F. Supp. 792 (N.D. Ill. 1985).

The Respondents-Appellants concede that the issue in this case is the same as in Advanced Lightweight Concrete in which the Supreme Court has already granted certiorari. However, there are presently proceedings pending involving the Petitioners and Respondents before the National Labor Relations Board First Region; In the Matter of: Seafood Producers Association of New Bedford, Mass., Inc., and Seafarers International Union of North American, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO: Case Nos. 1-CA-23,453, 1-CA-23,588, 1-CA-23,645, 1-CA-23,715, 1-CA-23,850;

In the Matter of: Baltic Enterprises, Inc., d/b/a F/V/ Baltic and New Bedford Fishermen's Welfare Fund and New Bedford Fishermen's Pension Trust: Case No. 1-CA-23,852; In the Matter of: Seafood Producers Association of New Bedford, Mass., Inc., and Baltic Enterprises, Inc., d/b/a F/V Baltic and Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO, Case No. 1-CA-23,914. Trial has been commenced in these matters and at some point there will be a decision by the Board or a settlement will be reached. These matters include the issue of Pension and Welfare Fund contributions the date of any impasse as well as other issues.

If Section 515 is interpreted to provide a separate grant of jurisdiction then Section 505 in addition to a method independent of the N.L.R.B. to collect

contributions imposes severe sanctions. Section 505 provides for interest, payment of the funds' attorney's fees, costs, and a penalty in the form of double interest. An employer who believes an impasse is reached may suffer severe financial consequence if a determination is later reached that an impasse was not reached or existed at a later date. These sanctions were clearly aimed at the employer who was obligated by contract to contribute, but due to financial problems chose to ignore this responsibility. Nowhere is there evidence the Congress intended these sanctions to be considered in labor management disputes.

If the Federal Courts do have jurisdiction, then; in defense to an action for post-contract expiration contributions, an employer will often raise the existence of an impasse as a

defense. The litigation will then be more complex than the simple question of whether payments were made or not made. The issue of an impasse includes matters other than the fund payments but involves a range of other unrelated labor-management issues. As a practical matter there will often be proceedings in both the N.L.R.B. and the Courts.

If proceedings were to exist in both the Courts and the Board, then the Courts should and would defer to the specialized competence of the Board for determination. If this is the case then the exclusive jurisdiction of the entire issue should remain with the Board and not with the Courts.

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

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